No. 11563

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. GORDON,

Appellant,

vs.

KENYON J. SCUDDER, Superintendent of the California Institution for Men Located at Chino, California,

Appellee.

APPELLANT'S CLOSING BRIEF.

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PRELIMINARY STATEMENT IN RESPONSE TO APPELLEE'S BRIEF.

It will be noted that appellee's "Statement of Case" is confined to a chronology of the history of the case through the State and the Federal courts. It is significant that he does not assert that appellant's statement of the events and evidence (App. Op. Br. pp. 37-43)[1] is inaccurate or incorrect. Appellant, therefore, comes before this Court relying not only upon the prescribed assumption that the allegations of his petition are true (*Williams v. Kaiser,* 323 U. S. 471, 89 L. Ed. 398, 65 S. Ct. 363; *White v. Ragen,* 324 U. S. 760, 89 L. Ed. 1348, 65 S. Ct. 978; *House v. Mayo,* 324 U. S. 42, 89 L. Ed. 739) but fortified by the added fact that appellee has not attempted to question the accuracy of his summation of them.

As shown by appellant's "Summary of Argument" (Op. Br. pp. 17-18) nine contentions are advanced. These fall into three general groups:

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[1]Hereinafter referred to as "Opening Brief."

1. (a) That appellant had exhausted his state remedies,
   (b) That no further remedies in the *state* courts were available to him,
   (c) That he was not required to show that his case presented exceptional circumstances of peculiar urgency.
2. That he was deprived of his constitutional guarantees under the Fourteenth Amendment in that his right of appeal was vitiated in respect to his conviction on both the grand theft counts *and* on the conspiracy count of the indictment.
3. That the record discloses a further lack of due process in respect to his conviction on the conspiracy count in that:
   (a) The code section (Pen. Code Sec. 182) under which the charge was laid includes an unconstitutional clause,
   (b) That the indictment alleged that one of the objects of the conspiracy charged was to do the acts purportedly inhibited by this unconstitutional clause,
   (c) That the term of his sentence was not fixed by a judicial body,
   (d) That he was not informed of the basis of the charge against him,
   (e) That his right of appeal was vitiated by the manner in which his contention, that the record was devoid of proof of the existence of a conspiracy within the period of limitations, was treated by the state appellate courts.

Under Point "I" of his argument appellee has attempted to reply to Points 1(a) and 1(b) above. Under Point "II" he has sought to reply to Point 2. Under Point "III" he refers to Points 3(a) and 3(b), but does not attempt

to argue against Points 3(c) and 3(d). Under Point "IV" he purports to reply to Point 3(e) above, and under Point "V" argues, under the heading "Other Offenses," a contention which, while included in appellant's petition to the District Court below [Tr. par. XIV, p. 25], was not urged by appellant in his Opening Brief.

We feel that greater clarity of presentation will be achieved if this reply follows the order in which appellant developed his points in his Opening Brief.

ARGUMENT.

I. Appellant's Exhaustion of State Remedies.

In his Summary of Argument appellee asserts that:

> "1. The fact that the Supreme Court of the State of California denied appellant's application for a writ of habeas corpus without rendering an opinion was not a good, sufficient or legal reason for the filing of a similar application with the United States District Court without first seeking a review by the Supreme Court of the United States, unless the alleged facts showed a case of peculiar urgency why the writ should issue by a federal court." (Appellee's Brief par. 1, p. 4.)

A. Contrary to this contention, the Supreme Court held in *Ex parte Hawk,* 321 U. S. 114, 117, 88 L. Ed. 572, 575:

> "The statement that the writ is available in the federal courts only 'in rare cases' presenting 'exceptional circumstances of peculiar urgency,' often quoted from the opinion of this Court in United States *ex rel.* Kennedy v. Tyler, *supra* (269 U. S. 17, 70 L. ed. 143, 46 S. Ct. 1), was made in a case in which the petitioner had not exhausted his state remedies and is inapplicable to one in which the petitioner has exhausted his state remedies, and in which

he makes a substantial showing of a denial of federal right."

In our Opening Brief we pointed out at pages 19 to 31 that appellant had exhausted his state remedies. Appellee admits at page 5, *et seq.*, of his brief that it is true that the general rule "that an application for habeas corpus by one detained under a state judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in the Supreme Court of the United States by appeal or writ of certiorari, have been exhausted" is subject to the exception that "where the decision of the state court is that the remedy of habeas corpus is not available under the state practice, or its decision is based upon some other adequate non-federal ground * * * it is unnecessary for the petitioner to ask the Supreme Court of the United States for certiorari in order to exhaust his state remedies * * *."

He urges, however, that where "habeas corpus is available under the state practice and the petition is based upon state and federal grounds and is denied by the state court without opinion and it appears from an examination of the record that the state grounds are insubstantial, it will be presumed that the state court based its judgment on the law raising the federal question, and the Supreme Court of the United States will take jurisdiction" (Appellee's Brief p. 6), citing *Williams v. Kaiser, supra,* as an authority for this contention.

He then points out, as we of course concede, that the remedy of *habeas corpus* is available in the State of California and then in an effort to bring this case within the asserted rule of the *Williams* case urges "that the state grounds urged by appellant in his petition for a writ of habeas corpus filed with the Supreme Court of California are insubstantial * * *."

In the *Williams* case the petition for writ of *habeas corpus* which Williams filed in the Supreme Court of Missouri alleged that prior to pleading guilty to, and his sentence on, an indictment charging him with robbery by means of a deadly weapon, petitioner requested the aid of counsel. At the time of his conviction and sentence the court did not appoint counsel, nor did petitioner waive his constitutional right to the aid of counsel and he was incapable adequately of making his own defense, in consequence of which he was compelled to plead guilty. He, therefore, contended that he was deprived of counsel contrary to the requirements of the due process clause of the Fourteenth Amendment.

The Supreme Court of Missouri denied the petition for the reason that it "fails to state a cause of action," but did not otherwise "indicate the reasons for its denial." Missouri did not suggest that "its habeas corpus procedure is not available in (the) situation." The Missouri Supreme Court had ruled "that when a defendant requests counsel it will be 'presumed,' in absence of evidence to the contrary, that he 'was without counsel and that he lacked funds to employ them.' "

Based upon this fact situation, the United States Supreme Court ruled that "certainly it may be reasonably inferred from that request and from the further allegation that as a result of the court's failure to appoint counsel petitioner was 'compelled to plead guilty,' that he was unable to employ counsel to present his defense because he was without funds."

The court then analyzes the application to that case of the suggestion—which we believe is most pertinent here—"that for all we (the United States Supreme Court) know the denial of the petition by the Supreme Court of Missouri rested on adequate state grounds," saying:

> "It is a well established principle of this Court that before we will review a decision of a state court

it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and its decision of the federal question was necessary to its determination of the cause. (Citing cases.) And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. (Citing cases.) We adhere to those decisions. But it is likewise well settled that if the independent ground was not a substantial or sufficient one, 'it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.' (Citing cases.) Thus in Maguire v. Tyler, 8 Wall. (U. S.) 650, 19 L. ed. 320, and in Neilson v. Lagow, 12 How. (U. S.) 98, 110, 13 L. ed. 909, 914, it was contended that the judgments rested on adequate state grounds. In neither was there an opinion of the state court. The Court examined the record, found the state grounds not substantial or sufficient, and reversed the judgments on the federal question. We think the principle of those cases is applicable here. The petition establishes on its face the deprivation of a federal right. The denial of the petition on the grounds that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on the federal right. And when we search for an independent state ground to support the denial, we find none. The Attorney General of Missouri only goes so far as to say that the petition did not state facts sufficient to justify the appointment of counsel under the Missouri statute."

* * * * * * * *

> "We *can only assume therefore that the* DENIAL *by the Supreme Court of Missouri was for the reason that the petition stated no cause of action based on the federal right.*"[1]

In the dissenting opinion filed by Mr. Justice Frankfurter and concurred in by Mr. Justice Roberts, those Justices differ with the majority only in that they state that the court should, upon the facts, have reached the opposite assumption, *i. e.,* that the court should assume "obedience" rather than "disobedience" of the mandate of the United States Constitution by the state court, and hence assume that the state court found a "local inadequacy" in the petition for *habeas corpus* and "in fact *refused to grant the writ* of habeas corpus because it concluded that there was not a sufficient allegation by petitioner that he had need for counsel."

In a footnote appearing on page 481 *et seq.* of the decision as reported in 323 U. S. and at p. 405 *et seq.* of the Lawyers edition, the dissenting judges summarize the law as follows:

> "The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one.

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[1]All emphasis shown throughout this brief is that of appellant unless the contrary is noted.

But where it does not appear on which of the two gounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction." (*Klinger v. Missouri,* 13 Wall. (U. S.) 257, 263, 20 L. Ed: 635, 637.)

"These settled principles were very recently again summarized in a per curiam opinion in Southwestern Bell Teleph. Co. v. Oklahoma, 303 U. S. 206, 212, 213, 82 L. ed. 751, 754, 755, 58 S. Ct. 528.

"We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that *it must appear affirmatively from the record,* not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; *that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."* (Citing cases.)

It is thus apparent that the pivot about which the case turned was the holding of the majority of the court that the *"denial by the Supreme Court of Missouri"* of the application for the writ *"was for the reason that the petition stated no cause of action based on the federal right."*

It is not even suggested by counsel for appellee that the record at bar will support such a claim. He merely asserts that the *"state grounds urged by appellant* in his petition *for a writ of habeas corpus* filed with the Su-

preme Court of California are insubstantial" (Appellee's Brief p. 7), which is a wholly different thing from an assertion that the writ *was denied because "the petition stated no cause of action based on the federal right."* Indeed, the entire burden of appellee's argument extending from Point II, page 9, of his brief, to Point V, page 15, is that the grounds urged in appellant's application for the writ before the Supreme Court of California were insubstantial upon the basis of state law.

Surely, upon such a basis, there can be no room for the claim, that the denial by the Supreme Court of California was for the reason "that the petition stated no cause of action based upon federal right," or that it did *"affirmatively appear* from the record that the federal question was presented to the highest court of the State having jurisdiction and *that its decision of the federal question was necessary to its determination of the cause."*

The case at bar is, on the contrary, one where:

> "* * * in the absence of any opinion indicating that decision in the present cases turned on a Federal question, we cannot say that the refusal to entertain the petitions for habeas corpus in these cases does not rest on an adequate non-federal ground. For that reason, we must dismiss these writs of certiorari." (*White v. Ragen* and *Lutz v. Ragen,* 324 U. S. 760, 766, 67 S. Ct. 978, 89 L. Ed. 1348, 1353.)

In the case of *Lynch v. New York ex rel. Pierson,* 293 U. S. 52, 53, 79 L. Ed. 191, 192, the Supreme Court said:

> "* * * The relator sought review by the Supreme Court of New York, invoking rights under the Constitution and laws of the State of New York and under the Fourteenth Amendment of the Constitution of the United States. The Appellate Divi-

sion of the Supreme Court, Third Department, annulled the determination of the State Tax Commission, 237 App. Div. 763, 263 N. Y. S. 259. That Court, while citing decisions of this Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States. The Court of Appeals of the State affirmed the order of the Appellate Division, but without opinion (263 N. Y. 533, 189 N. E. 684), and the grounds of its decision are left to conjecture. *It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise."*

We have examined each of the cases cited in the *Williams* case in support of the statement that "if the independent ground was not a substantial or sufficient one, it will be presumed that the state court based its judgment on the law raising the Federal question and this court will then take jurisdiction," and find that in each of them the *ground* examined and ruled, was the *ground* upon which the state court had denied or granted the relief sought, and that in each such case the court decided from the record whether that ground rested on Federal or State laws.

It follows that it was not necessary for the appellant here to seek certiorari in the Supreme Court of the United States in order to exhaust his state remedies.

B. On page 8 of his brief appellee asserts that "Habeas Corpus Cannot Be Employed as Substitute for Writ of Error" and cites the cases following:

In the *Felts v. Murphy* case, 201 U. S. 123, 26 S. Ct. 366, 368, 50 L. Ed. 689, the court considered a contention that the fact that the defendant did not hear a word of the evidence given upon his trial because of his almost total deafness, amounted to a deprivation of his liberty without due process of law under the Fourteenth Amendment. It held that if there were any irregularities at the trial because of the failure of the court to see to it that the testimony was repeated to him through an ear trumpet, it "was at most an error which did not take away from the court its jurisdiction over the subject-matter and over the person of the accused" and that the "writ cannot perform the function of a writ of error."

In *Burall v. Johnson* (C. C. A. 9), 134 F. (2d) 614, this Court passed upon the contention that the defendant, *who had not appealed*, had been denied due process in that he was convicted on the evidence of a confession procured by duress, threats and promises and was thereby forced into becoming a witness against himself. This Court held that the time to inquire into the circumstances of the confession was during the progress of the trial, that the error, if any, was subject to correction on appeal, and that the writ of *habeas corpus* can not be used as a writ of review, or as a means of correcting error in the admission of evidence.

In Valentina v. Mercer, 201 U. S. 131, 26 S. Ct. 368, 370, 50 L. Ed. 693, the court considered a contention that appellant had been convicted without authority of law in that the question of her guilt or innocence of murder was not entertained by the court or submitted to the jury but on the contrary evidence was taken on the trial merely to determine the degree of her guilt.

The court held that there was "no possible doubt that the petitioner has had a *valid* trial by a court having

jurisdiction of the subject-matter and of the person of the accused and that there was no loss of jurisdiction over either at any time during the trial," and stated:

> "* * * Our power to interfere in cases of this nature is limited entirely to the question of jurisdiction. If the state court had jurisdiction to try the case, and had jurisdiction over the person of the accused, and never lost such jurisdiction, the Federal circuit court was right in denying the application of petitioner for a writ, and its order must be affirmed. A writ of this nature cannot perform the function of a writ of error."

In *Collins v. Johnston,* 237 U. S. 502, 35 S. Ct. 649, 651, 59 L. Ed. 1071, the Court reviewed an order of a United States District Court denying a petition for writ of *habeas corpus* filed by a defendant convicted of perjury. The Court examined various of his contentions, which were representative of the rest, and rejected them as amounting to no more than error committed in the exercise of jurisdiction, unfounded as a matter of state law, or not amounting to a denial of any Federal right, and held that upon *habeas corpus* the Court was confined "to the examination of fundamental and jurisdictional questions, and that the writ cannot be employed as a substitute for a writ of error."

In *United States v. Ragen* (C. C. A. 7), 146 F. (2d) 349, 351, the matter arose on an appeal on certificate of probable cause from a United States District Court. The reviewing court first ruled that the contention of the appellant that the judgment against him was the result of a sham trial was groundless, stating that, contrary to appellant's contention, there was an abundance of evidence to support his conviction, and then said:

> "* * * Even if we disagreed with the Supreme Court of Illinois over the sufficiency of the evidence,

we could give no relief for two reasons: First, we may not review in a habeas corpus proceeding errors of law committed by the courts of Illinois. (Citing cases.) Secondly, whether there was evidence to support the verdict involves the guilt or innocence of the appellant, with which on habeas corpus we are not concerned. As Justice Holmes said in Moore v. Dempsey, *supra:* '* * * what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.'

In a court of competent jurisdiction, whose jurisdiction was never lost or disturbed at any stage of the proceedings, the petitioner *received a fair and impartial trial.* That is due process. He can ask no more."

Of, course, none of these cases reach or rule our contention which is that "The misstatement and distortion of the facts by the California District Court of Appeal vitiated, and deprived appellant of, the right of appeal guaranteed to him by the Constitution of California, and was a violation of his right to due process and the equal protection of the law under the 14th Amendment." (Op. Br. p. 32.)

II. Appellant's Right of Appeal.

The appellee asserts:

"The constitutional or statutory right of appeal, guaranteed by the Fourteenth Amendment of the Constitution of the United States, is not denied because an appellate court in its decision affirming the judgment ignores, distorts or misstates the evidence." (Appellee's Brief par. 2, p. 4.)

In his argument (Appellee's Brief p. 9) he concedes that "the constitutional or statutory right of appeal" is

"guaranteed by the due process clause of the Fourteenth Amendment," citing *Frank v. Mangum,* 237 U. S. 309, 35 S. Ct. 582, 587, 59 L. Ed. 969. He advances no authority, however, for his statement that this right is not denied "because an appellate court in its decision ignores, distorts or misstates the evidence."

In the case of *Ex parte Converse,* 137 U. S. 624, 632, 11 S. Ct. 191, 193, 34 L. Ed. 796, 799, the Court ruled:

> "We repeat, as has been so often said before, that the Fourteenth Amendment undoubtedly forbids any *arbitrary* deprivation of life, liberty or property * * *.",

but held that it was not within the "province" of the Court to inquire whether the conclusion of the Supreme Court of Michigan, that a plea of guilty entered by appellant amounted to a plea of guilty to a felony rather than to a misdemeanor, "was or was not correct, for we are not passing upon its judgment as a court of error," and that a "state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if *erroneous,* of its highest court, while acting within its jurisdiction."

It is true, with respect to the cases cited by appellee, that *Worcester County Trust Co. v. Riley,* 302 U. S. 292, 58 S. Ct. 185, 188, 82 L. Ed. 268, holds that the Constitution of the United States does not guarantee that the decision of the state courts shall be free from error; that the case of *Central Land Co., etc. v. Laidley,* 159 U. S. 103, 112, 16 S. Ct. 80, 83, 40 L. Ed. 91, 95, holds that "*When* the parties *have been fully heard* in the *regular* course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party * * * of due process"; that *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86, 97, 29 S. Ct. 220, 221, 53 L. Ed. 417, 425, holds that the Federal courts do not sit to review the findings of fact made in the state

court "but accepts (them) as conclusive" and confine their review to "questions of Federal law within the jurisdiction conferred upon this court", and that *Milk Drivers, etc. v. Meadowmoore Dairies,* 312 U. S. 287, 294, 61 S. Ct. 552, 85 L. Ed. 836, 841, states that the "place to resolve conflicts in the testimony and its interpretation was in the Illinois courts and not here."

These cases, however, do not reach or rule the contention of appellant. He asserts not mere error, such as was considered in the above cases, but rather such action by the California courts as "in effect deprived (him) of his right of appeal" (Op. Br. pp. 33-37), or expressed in terms of error, "error * * * gross and obvious, coming close to the boundary of arbitrary action." *Roberts v. City of New York,* 295 U. S. 264, 277, 79 L. Ed. 1429, 1435.

In our view, appellee overlooks the fact that in *Frank v. Mangum, supra,* the Supreme Court of the United States in holding at p. 327, L. Ed. p. 980:

> "* * * And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases (citing cases), it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment.",

commented on the fact that Congress in the Act of Feb. 5, 1867 (14 Stat. at L. 385) liberalized the prior law, saying at p. 330, L. Ed. p. 981:

> "* * * The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, chap. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the

causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

There being no doubt of the authority of the Congress to thus liberalize the common-law procedure on habeas corpus in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very *truth and substance* of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him. (Citing cases.)",

and further said:

"In the light, then, of these established rules and principles: that the due process of law guaranteed by the 14th Amendment has regard to *substance of right, and not to matters of form or procedure;* that it is open to the courts of the United States, upon an application for a writ of habeas corpus, *to look beyond forms and inquire into the very substance of the matter,* to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, * * *",

and that Mr. Justice Holmes, in his dissenting opinion, with whom Mr. Justice Hughes concurred, used these words at p. 346, L. Ed. 988:

"* * * But habeas corpus cuts through all forms and goes to the very tissues of the structure. It comes in from the outside, not in subordination to the proceedings, and *although every form may have been preserved, opens the inquiry whether they have been more than an empty shell",*

Appellee also overlooks the fact that the Supreme Court in the late case of *Carter v. Illinois Supreme Court,* L. Ed. Adv. Ops. Vol. 91, No. 3, pp. 157, 159, said:

> "In a series of cases of which Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265, was the first, and Ashcraft v. Tennessee, 327 U. S. 274, 90 L. Ed. 667, 66 S. Ct. 544, the latest, we have sustained an appeal to the Due Process Clause of the Fourteenth Amendment for a fair ascertainment of guilt or innocence."
>
> * * * * * * * *
>
> "The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry *into the intrinsic fairness of a criminal process even though it appears proper on the surface.* Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record."
>
> * * * * * * * *
>
> "* * * A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of habeas corpus or *coram nobis.* It may use each of these ancient writs in its common law scope, or it may put them to new uses; or, it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention (citing cases). So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated."

We submit that whatever the mode provided by the State—in this case the writ of *habeas corpus*—the petitioner is entitled to relief if he is shown to have been denied the substantial exercise of such constitutional right as distinguished from the merely colorable exercise of it.

III. Appellant's Contentions Respecting the Unconstitutionality, in Part of Penal Code Section 182 and the Resultant Denial of Due Process.

Appellant advanced in his Opening Brief, among others, three grounds in respect to his conviction of conspiracy, numbered as follows:

Point 3: That the clause in Section 182 reading "To cheat and defraud any person of any property by any means which are in themselves criminal" was unconstitutional and void for vagueness and uncertainty;

Point 4: That appellant's conviction of a conspiracy which included as one of the objects the commission of the purported offense above quoted was in violation of the due process clause of the Fourteenth Amendment;

Point 5: That because different penalties were prescribed, depending on the objects of the conspiracy, the imposition of a sentence "for the term prescribed by law" constituted a denial of due process.

Appellee, significantly, does not question the soundness or applicability of the authorities cited by appellant in support of these points. He merely refers to the circumstance that appellant's petition for a writ of *habeas corpus* to the *California* Supreme Court set forth these grounds and that the opinion of the District Court of Appeal which affirmed the conviction does not disclose that a contention was made as to the unconstitutionality of Section 182.

Appellee argues that "Since the validity of Section 182 of the Penal Code was presented to the Supreme Court of the State of California by *habeas corpus,* it was unneces-

sary for the Supreme Court in such proceeding to consider whether said clause in said code section was unconstitutional because of uncertainty or vagueness, or otherwise." (Appellee's Brief p. 13.) In support of this statement he cites the case of *In re Bell,* 19 Cal. (2d) 488, 122 Pac. (2d) 22.

In the *Bell* case the court did consider the validity of the ordinance in question and held at page 497:

> "* * * The entire section is therefore invalid even though Yuba County might validly prohibit excessive and unnecessary obstruction of the streets and highways."

At page 495 of the opinion it is said:

> "While a few courts require that all available remedies by appeal be exhausted before *habeas corpus* can be invoked to test constitutionality (see Goto v. Lane, 265 U. S. 393 (44 S. Ct. 525, 68 L. ed. 1070)), most jurisdictions, including California, do not make the requirement mandatory (see cases collected in 13 Cal. Jur. 225, sec. 8; 25 Am. Jur. 164, sec. 29), and even permit the issue of constitutionality to be raised by habeas corpus before trial." (Citing cases.)

However, assuming for the sake of the argument that the above mentioned points of appellant were rejected by the California Supreme Court in its consideration of appellant's application for *habeas corpus,* for the reason advanced by appellee, his argument in the last analysis is that an adequate non-federal ground existed for said denial.

IV. The Failure of Appellee to Respond to Point 6 of Appellant's Brief.

It will be noted that appellee has failed to respond to the contentions advanced by appellant under Point 6 of his Opening Brief.

These contentions relate to the proposition that appellant was denied due process of law and the equal protection of the law in that he was not informed of the basis of the

charge of conspiracy nor given the opportunity to prepare his defense thereto.

A further contention under this heading is to the effect that section 952 of the Penal Code of California is unconstitutional in so far as the provisions of that section were relied upon to authorize the pleading of a conspiracy in the manner in which it was pleaded in the instant case.

We, therefore, respectfully invite the court's attention to page 62, *et seq.,* of Appellant's Opening Brief.

V. Appellant's Contention That His Right of Appeal Was Vitiated by the Manner in Which the District Court of Appeal Disposed of the Claim That There Was No Proof of the Existence of a Conspiracy Within the Statutory Period of Limitations.

Appellee responds to this contention of appellant (Opening Brief, pp. 68-69), saying:

> "From the narration of the evidence set forth in the opinion of the said District Court of Appeal, it is reasonable to conclude that the court found that the conspiracy existed within three years of the return of the indictment." (Appellee's Brief p. 14.)

It is precisely for the reason that the "narration of the evidence set forth in the opinion of the said District Court of Appeal" is not a true narration that complaint is made of the vitiation of appellant's right of appeal. The crux of this contention is the vitiation of appellant's right of appeal and not, as appellee seems to believe, a mere question of the insufficiency of proof of the existence of the asserted conspiracy during the three-year period.

Conclusion.

Appellant therefore respectfully submits that the District Court below erred in discharging the order to show cause and in denying the issuance of a writ of *habeas corpus,* and that he is entitled to the relief which he seeks.

Respectfully submitted,

MAURICE GORDON,

Attorney for Appellant.